

C.A. No. 13-01234

In The
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

JACQUES BONHOMME, *Plaintiff-Appellant, Cross-Appellee,*

v.

SHIFTY MALEAU, *Defendant-Appellant, Cross-Appellee.*

STATE OF PROGRESS, *Plaintiff-Appellant, Cross-Appellee,*
and SHIFTY MALEAU, *Intervenor-Plaintiff-Appellant, Cross-Appellee,*

v.

JACQUES BONHOMME, *Defendant-Appellant, Cross-Appellee.*

Appeal from the United States District Court for the District of Progress
Case Nos. 155-CV-2012 & 165-CV-2012

STATE OF PROGRESS' RESPONSE BRIEF TO COURT'S ORDER

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STATEMENT OF JURISDICTION

This appeal is the result of the district court's final judgment and "order involv[ing] a controlling question of law" in two consolidated cases. 28 U.S.C. § 1292(b) (2012). The district court had jurisdiction over one of the cases and continues to have jurisdiction over the other based upon federal question jurisdiction. 28 U.S.C. § 1331 (2012). This Court has jurisdiction over both appeals under 28 U.S.C. §§ 1291, 1292(b) (2012). On July 23, 2012, the district court issued an order granting Shifty Maleau's motion to dismiss Jacques Bonhomme's suit against Shifty Maleau, and denying Jacques Bonhomme's motion to dismiss Progress' suit against him. In addition to the final disposition of one action, the district court's order involved several controlling questions of law applicable to Progress' ongoing case.

The appellants filed a timely notice of appeal of the district court's order.

STATEMENT OF THE ISSUES

1. Whether Jacques Bonhomme satisfies the requirements to be a real party in interest in his suit against Shifty Maleau.
2. Whether a foreign national may bring suit under the Clean Water Act's citizen suit provision.
3. Whether Reedy Creek falls within the Clean Water Act's "waters of the United States" because of its use in interstate commerce.
4. Whether Ditch C-1 falls within the Clean Water Act's "waters of the United States" because it is a permanent tributary to a traditional navigable water, Reedy Creek, or alternatively because it is a non-permanent tributary that bears a significant nexus with Reedy Creek.

5. Whether mining waste piles, whose pollutant additions stem from precipitation not manmade diversion, constitute point sources under the Clean Water Act.
6. Whether an individual's point source liability must stem from an intentional action rather than inaction.

STATEMENT OF THE FACTS

Jacques Bonhomme ("Bonhomme") and Shifty Maleau ("Maleau") operate competing companies that mine precious metals. Bonhomme, a French citizen, is the largest stockholder, president, and board of directors' member of the international mining company Precious Metals International ("PMI"). PMI owns five gold mines around the world, including two in the United States but neither is in Progress. Maleau operates a gold mine adjacent to the Buena Vista River in Lincoln County, Progress.

Maleau and Bonhomme each own property in Jefferson County, Progress. The two properties have a common drainage ditch, Ditch C-1. The ditch collects rainwater runoff from several properties and drains the saturated soils of excess moisture to make the soil suitable for agricultural use. Ditch C-1 runs from Maleau's property through several agricultural properties before draining through a culvert on Bonhomme's property into Reedy Creek. Ditch C-1 was constructed in 1913 and restrictive deeds require both Maleau and Bonhomme to maintain the ditch on their properties. Ditch C-1 contains running water for most of the year, except during drought. Droughts typically last from several weeks to three months in a year.

Maleau transports his gold mining overburden and slag from his operation site in Lincoln County to the Jefferson County property where he stores it in piles. There is no drainage system or storage pond to direct any rainwater runoff from these piles. When it rains, rainwater runs down the piles and percolates through the piles and picks up arsenic. Then, the water flows

through channels created by gravity and carries the arsenic-laden runoff into Ditch C-1. The water then flows through the ditch and into Reedy Creek.

Ditch C-1 only flows within the State of Progress, but the Reedy Creek starts in New Union and runs into Progress. In New Union, Bounty Plaza uses Reedy Creek to supply water to its service area. This service area sells food and gasoline to people on Interstate 250 (“I-250”). I-250 is a federally-funded east-west highway. After flowing out of New Union, Reedy Creek flows fifty miles south through Progress before ending in Wildman Marsh. Farmers from both states use the creek’s water for irrigating their crops which are sold across the country. Wildman Marsh is a large wetland and is an important stop over for millions of migratory ducks and geese. A large portion of the marsh is a national wildlife preserve that is owned and maintained by the U.S. Fish and Wildlife Service. Wildman Marsh is a destination for fowl hunting and draws hunters from five states, including New Union and Progress. Fowl hunting adds \$25 million to Progress’ local economy every year.

Bonhomme’s property is adjacent to Wildman’s Marsh. He does not live on the property, but he uses the hunting lodge on that property to host hunting parties comprised primarily of PMI business associates and clients. Bonhomme alleges that the arsenic in the water from Ditch C-1 is polluting Reedy Creek and the marsh to such an extent that he is afraid to continue using the marsh for his hunting parties. He has decreased the number of hunting trips he hosts from eight annually to two trips annually. However, the decrease in hunting trips also coincides with declines in PMI’s profits.

PMI funded water testing for both Ditch C-1 and Reedy Creek. The testing indicated that the water in Ditch C-1 upstream from Maleau’s property did not have detectible arsenic concentrations, but the water just below Maleau’s property had high arsenic concentrations.

Testing in Reedy Creek showed that the water upstream from where Ditch C-1 flows into Reedy Creek did not show any traces of arsenic, but significant concentrations of arsenic were present downstream from Ditch C-1. PMI funded the water testing and Bonhomme's attorney and expert fees in this case.

PROCEDURAL HISTORY OF THE LITIGATION

Bonhomme, under the Clean Water Act's ("CWA") citizen suit provision, sued Maleau for allegedly violating the CWA by discharging pollutants into Ditch C-1 without a National Pollutant Discharge Elimination System ("NPDES") permit via water runoff from his mining waste piles into Ditch C-1. Concurrently, Progress, also under the CWA's citizen suit provision, sued Bonhomme for violating the CWA by discharging pollutants into Reedy Creek without a NPDES permit via a culvert on his property. Maleau intervened in Progress' suit under 33 U.S.C. § 1365(b)(1)(B) (2012). With the district court's permission, Progress and Maleau consolidated their cases, as the facts and law at issue were the same. Both Bonhomme and Maleau moved to dismiss the case.

The U.S. District Court of Progress dismissed Bonhomme's suit because he was not the proper plaintiff to bring the suit. First, the district court held Bonhomme was not the real party in interest under Fed. R. Civ. P. 17(a), and secondly, that Bonhomme, as a foreign national, could not bring suit under the CWA's citizen suit provision. The district court denied Bonhomme's motion to dismiss holding that Progress had an adequate cause of action.

The district court then went on address the issues of navigable waters and point sources. The district court held that Reedy Creek is a navigable water under the CWA, therefore any point source discharges into it would require an NPDES permit, and that Ditch C-1 is not navigable

under the CWA. The district court also held Bonhomme's culvert to be a point source under the CWA, but not Maleau's mining waste piles. All parties appealed the district court's order.

SUMMARY OF THE ARGUMENT

A person who is merely serving as the plaintiff in the stead of another is not the real party in interest under the Fed. R. Civ. P. 17. Additionally, the citizen suit provision of the CWA does not include foreign nationals as those who may bring the suit.

Reedy Creek and Ditch C-1 are navigable waters and therefore are waters of the United States under the CWA. Reedy Creek is sufficiently used in interstate commerce to classify it as a traditional navigable water. Ditch C-1 either a permanent tributary to a traditional navigable water or a non-permanent tributary of a navigable water that it bears a significant nexus with; under either consideration Ditch C-1 is a navigable water under the CWA.

Bonhomme's culvert is a point source under the CWA, which requires a NPDES permit. Because Bonhomme is conveying pollutants from a point source into a navigable water without a NPDES permit, he is liable for this violation under the CWA. Additionally, Maleau's waste mining piles are not point sources under the CWA because they are not discrete conveyances of pollution that are collected or channeled by man.

STANDARD OF REVIEW

This Court reviews a lower court's real party in interest determination *de novo* because it is a question of law. *Curtis Lumber Co. v. Louisiana Pacific Corp.*, 618 F.3d 762, 771 (8th Cir. 2010).

This appeal is brought by Progress under 28 U.S.C. § 1292 (2012). This section allows for interlocutory appeals and case law illuminates that an appellate court should grant review when the issues present

(1) pure questions of law, (2) which are controlling of at least a substantial part of the case, (3) and which are specified by the district court in its order, (4) and about which there are substantial grounds for difference of opinion, (5) and whose resolution may well substantially reduce the amount of litigation necessary on remand.

McFarlin v. Conseco Servs., LLC, 381 F.3d 1251, 1264 (11th Cir. 2004). The issues presented by Progress are purely matters of law that when decided will substantially affect the case. The district court specifically included them in its order, there are substantial grounds for the difference of opinion based upon the Environmental Protection Agency's ("EPA") guidance, and this Court's rulings on Progress' contested issues of law will "serve to avoid a trial or otherwise substantially shorten the litigation" because the district court could dispose of this case at summary judgment with favorable rulings. *Id.* at 1259. As a pure question of law involving statutory interpretation and agency regulations these issues should be reviewed *de novo*. *Metzger v. UNUM Life Ins. Co. of Am.*, 476 F.3d 1161, 1165 (10th Cir. 2007).

ARGUMENT

This brief is filed in response to the Court's September 14, 2013 order to brief the issues of whether Bonhomme is a suitable plaintiff, Reedy Creek and Ditch C-1 are navigable waters under the CWA, and Maleau's mining waste piles or Bonhomme's culvert constitute point sources under the CWA. Progress contends that (1) Bonhomme is not a suitable plaintiff, (2) Reedy Creek and Ditch C-1 are both navigable under the CWA, and (3) Bonhomme's culvert alone constitutes a point source under the CWA.

I. Court Lacks Jurisdiction Over Plaintiff's Claims.

Bonhomme is not the real party in interest; instead PMI is the real party in interest to the suit. The district court correctly found that Bonhomme could not act as a front to PMI's suit against Maleau. R. at 8. Additionally, Bonhomme is not able to bring a citizen suit under the CWA because he is not a citizen of the United States. The language of the CWA is silent as to

whether a foreign national is included in the definition of “citizen,” although the term is defined. If a term is defined in a statute it cannot be read out of the statute. For both of these reasons the court lacks jurisdiction over Bonhomme’s claims.

A. Precious Metals International, Not Bonhomme, is the Real Party in Interest.

A plaintiff in a civil suit must be the real party in interest. Fed. R. Civ. P. 17(a)(1). To be the real party in interest, a party must possess the substantive right to be enforced. *Curtis Lumber Co.*, 618 F.3d at 771. “The function of this rule ‘is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.’” *Id.* (citing Fed. R. Civ. P. 17(a) advisory committee note (1966)).

The District Court correctly dismissed Bonhomme’s complaint because he is merely serving as a plaintiff in the PMI’s stead. R. at 8. The lower court’s factual findings bolster its determination because PMI, the company which is a business competitor with Maleau’s and has Bonhomme as its largest shareholder, furnishes all of the legal costs, scientific testing, and experts for the litigation in the instant case. R. at 7. Bonhomme’s lodge does not serve as his domicile but rather as lodging “for hunting parties composed primarily of business clients and associates of PMI.” R. at 7–8. This Court should rely on the factual findings of the district court, and uphold the Court’s dismissal of Bonhomme’s suit against Maleau because Bonhomme is not the real party in interest.

B. Bonhomme Cannot Bring a Citizen Suit Under the Clean Water Act Because He is Not a Citizen.

Alternatively, if this court determines that Bonhomme is a real party in interest, then it should dismiss Bonhomme’s complaint because he cannot bring suit under the CWA’s citizen

suit provision. The CWA allows “any citizen” to “commence a civil action on his own behalf” against “any person” who has allegedly violated the other provisions of the CWA. 33 U.S.C. § 1365(a) (2012). The Act further defines a “citizen” as “a person . . . having an interest which is or may be adversely affected.” 33 U.S.C. § 1365(g).

Defining the term “citizen” as “a person” does not broaden the term to the point where any person is considered a citizen under the statute. The definition must be read in context. Defining a term does not constitute a basis for reading that term out of the statute. *E.g. Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 172 (2001) (“We cannot agree that Congress’ separate definitional use of the phrase “waters of the United States” constitutes a basis for reading the term “*navigable* waters” out of the statute). Furthermore, the CWA does not include foreign national in its definition of “person.” 33 U.S.C. § 1362(5) (2012) (“The term ‘person’ means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body”). This Court should uphold the district court’s dismissal of Bonhomme’s suit against Maleau because Bonhomme is a foreign national, not a citizen, and therefore Congress did not extend him the right to bring a suit under the CWA’s citizen suit provision of the CWA.

II. The Clean Water Act Governs the Discharge of Any Pollutant From a Point Source Into Navigable Waters.

The CWA’s definition of a “discharge of any pollutant” has three elements. It is defined as (1) “any addition of any pollutant,” (2) “to navigable waters,” (3) “from any point source.” 33 U.S.C. 1362(12)(A) (2012). Each element must be met to qualify as a discharge of a pollutant under the CWA. *Id.* To lawfully add a pollutant into a navigable water through a point source, one must obtain a NPDES permit. 33 U.S.C. §§ 1311(a), 1342(a) (2012). In this case, neither

Maleau, nor Bonhomme obtained a NPDES permit. To determine liability we must examine whether each of the three elements of the definition of any pollutant discharge is met for either party. It is undisputed among the parties that arsenic is a pollutant, so the analysis below is limited to the definitions of navigable waters and point source.

The Reedy Creek is a traditional navigable water under the CWA, and Ditch C-1 is a tributary that bears a significant nexus to the Reedy Creek. Maleau's piles are not subject to the federal regulatory scheme because they are nonpoint sources. Therefore, the district court did not err in its grant of summary judgment regarding the Reedy Creek and point source liability, but did err in its navigable waters determination for Ditch C-1.

A. *The Case Law and Statutory Development of the Clean Water Act's Navigable Waters' Definition.*

Prior to the CWA's passage, navigability was defined for a century by the Daniel Ball test that called for navigability in fact or for the body of water to be readily susceptible to navigability. *Rapanos v. United States*, 547 U.S. 715, 723 (2006). The definition of "navigable waters" is no longer limited to the Daniel Ball test.

1. *Definitional Development of "Waters of the United States" Within the U.S. Army Corps of Engineers' Line of Cases.*

The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (2012). Congress' intentionally vague statutory language left the "waters of the United States" interpretation to the implementing agencies. *See Chevron v. Nat'l Res. Def. Council*, 467 U.S. 837, 842-43 (1984). Because Congress left the language ambiguous for the agency to interpret, the only question left to the court under a *Chevron*

analysis is whether the agency's interpretation is a "permissible construction of the statute." *Id.* at 843.

The case law that has developed since the CWA's enactment has helped to develop and define the permissible statutory scope. The Supreme Court has granted certiorari three times to address the U.S. Army Corps of Engineers' interpretation of "waters of the United States" under the CWA: *Riverside Bayview Homes*, *Solid Waste Agency*, and, most recently, *Rapanos*.

Originally, the U.S. Army Corps of Engineers defined navigable waters under the Daniel Ball test, but subsequently it adopted a broader interpretation that was more consistent with Congress' intent. Congress intended to regulate beyond those waters that satisfy the traditional test for navigability because while it used the term "navigable waters" in the statute it defined the term as "waters of the United States." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985).

The U.S. Army Corps of Engineers has defined the Clean Water Act's "waters of the United States" as extending beyond the constitutional and traditional navigable water definition since 1975: "include not only actually navigable waters but also tributaries of such waters, interstate waters and their tributaries and non-navigable interstate waters whose use or misuse could affect interstate commerce" and all freshwater wetlands "adjacent to other covered waters." *Riverside Bayview Homes, Inc.*, 474 U.S. at 123–24. The extension to wetlands, which are not traditionally thought of as water, was tolerated by the Supreme Court given "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems." *Id.* at 133. "The regulation of activities that cause water pollution cannot rely on ... artificial lines ... but must focus on all waters that together form the entire aquatic system." *Id.* (quoting 42 Fed. Reg. 37128 (1977)). The Supreme Court concluded that "[i]n view of the breadth of federal

regulatory authority contemplated by the Act itself and inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act." *Id.* at 134. The adjacent wetlands provision was upheld ultimately because of the significant nexus between the navigable waters and the wetlands. *Solid Waste Agency*, 531 U.S. at 167 (2001).

By 1999, the Army Corps of Engineers expanded the "waters of the United States" to include waters such as intrastate lakes, rivers, streams (including intermittent streams, mudflats, sand flats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds,) the use degradation or destruction of which would affect interstate or foreign commerce. *Solid Waste Agency*, 531 U.S. at 163 (quoting 33 C.F.R. § 328.3(a)(3) (1999)). In *Solid Waste Agency*, the Supreme Court refused to allow the Army Corps to regulate ponds "that are *not* adjacent to open water." *Id.* at 168 (emphasis in original).

2. The *Rapanos*' Decision's Impact on the Definition.

The most recent Supreme Court interpretation of the term "navigable waters" in the CWA was *Rapanos v. United States* in 2006. In the plurality opinion, Justice Scalia wrote that waters, in its broadest context, were confined to "relatively permanent bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows." *Rapanos*, 547 U.S. at 716. Scalia ultimately declared, for wetlands, that (1) "the adjacent channel contains a 'wate[r] of the United States,' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters)" and (2) "the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins." *Id.* at 742.

The Supreme Court’s holding does not limit CWA enforcement, according to Scalia, because the lower courts have traditionally held “that the discharge into intermittent channels of any pollutant that naturally washes downstream likely violates § 1311(a), even if the pollutants discharged from a point source do not emit ‘directly into’ covered waters, but pass ‘through conveyances’ in between.” *Rapanos*, at 743. Justice Kennedy, in his concurrence, provides for the applicability of the significant nexus test that the EPA subsequently adopted in its guidance. *Id.* at 759 (concurring, J. Kennedy).

3. Post-*Rapanos* Guidance and Cases Further Illuminates Definition.

Following *Rapanos*’ plurality decision, the EPA published its Post-*Rapanos* guidance in the Federal Register for notice and comment and then issued its final guidance on Dec. 2, 2008. EPA and Army Corps of Engineers Guidance Regarding Clean Water Act Jurisdiction After *Rapanos*; Extension of Comment Period, 72 Fed Reg. 67,304 (proposed Nov. 28, 2007) (guidance issued Dec. 2, 2008; EPA, *Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States*, 4–5 (Dec. 2, 2008) [hereinafter Post-*Rapanos* EPA Guidance]. The guidance provided for EPA authority over traditional navigable waters, “all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce,” and wetlands adjacent, as in “bordering, contiguous, or neighboring,” to those traditional navigable waters. *Id.* at 4–5.

Additionally, the EPA “will assert jurisdiction over relatively permanent non-navigable tributaries of traditional navigable waters ... without the legal obligation to make a significant nexus finding.” *Id.* at 7. For non-permanent tributaries, the EPA will assert authority when there is a significant nexus between the non-permanent tributary and the traditional navigable water. *Id.* at 8.

To determine whether a significant nexus' exists between the non-permanent tributary and a traditional navigable water, the EPA will focus "on the integral relationship between the ecological characteristics of tributaries and those of their adjacent wetlands, which determines in part their contribution to restoring and maintaining the chemical, physical and biological integrity of the Nation's traditional navigable waters." *Id.* at 9. The first step is to determine if the tributary has adjacent wetlands. *Id.* at 10. "Principle considerations when evaluating significant nexus include the volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to a traditional navigable water." *Id.* at 10.

B. Reedy Creek is a Traditional Navigable Water Under the Clean Water Act.

To satisfy *Rapanos* and the EPA guidance, a body of water must either be adjacent to traditional navigable water or bear a significant nexus with it to be a navigable water under CWA. *See Great Northwest, Inc. v. U.S. Army Corps of Engineers*, 2010 WL 9499372 *4 (D. Alaska) (not reported). Reedy Creek is a traditional navigable water, and therefore Ditch C-1 is a navigable water under the CWA because it shares a significant nexus with Reedy Creek.

Reedy Creek is used in interstate commerce and therefore is a navigable water under the CWA. The fifty-mile long Reedy Creek extends through New Union into Progress and supplies water to a service station along the interstate highway, irrigates agricultural lands in both states from which products are sold in interstate commerce, and provides habitat to migratory birds in the Wildman Marsh. R. at 5. The EPA defines navigable water as "waters of the United States" that includes those waters currently used in interstate commerce. 40 C.F.R. § 122.2 (2012). Therefore, Reedy Creek is navigable under the CWA and subject to EPA regulation.

The District Court's finding that the Reedy Creek is navigable under the CWA is supported by the current EPA guidance and regulations as well as *Rapanos*. However, the lower

court's reasoning was flawed in its determination that Reedy Creek was navigable based on its relationship with the federally-regulated Wildman Marsh.

Under current EPA regulations and guidance, the Reedy Creek is a traditional navigable water because it is currently used in interstate commerce: supplies water to agricultural lands in two states, an interstate service station, and the Wildman Marsh which supports more than a million migratory birds and their recreational hunters. R. at 5-6. In the alternative, the Reedy Creek would be considered a navigable water under the CWA because its "use, degradation, or destruction ... would affect" interstate commerce. 40 C.F.R. § 122.2 (including waters "which are or could be used by interstate or foreign travelers for recreational or other purposes ... [and] for industrial purposes by industries in interstate commerce.").

C. Ditch C-1 Is A Navigable Water Under The CWA Because There Is A Significant Nexus Between Ditch C-1 And Reedy Creek.

There is a significant nexus between Ditch C-1 and the Reedy Creek because the ditch's regulation is essential to "maintaining the chemical, physical and biological integrity of the" Reedy Creek. Ditch C-1 contains flowing water for most of the year that deposits directly into the traditional navigable water, the Reedy Creek. R. at 5. Whatever is in the water in Ditch C-1 flows into Reedy Creek and affects its chemical physical and biological integrity. This is demonstrated by PMI's testing of Ditch C-1 and Reedy Creek, which shows that arsenic from Ditch C-1 flowed through the culvert and into Reedy Creek and Wildman March. The addition of this known poison threatens the integrity of Reedy Creek. Because of this significant nexus, Ditch C-1 is a non-permanent tributary of a traditional navigable water and included within the EPA's definition of "waters of the United States."

The District Court erred in finding that Ditch C-1 did not fall within the CWA's scope. As a permissible construction of the statute, the EPA's regulations interpret "waters of the United States" to include "waters such as intrastate ... streams (including intermittent streams) ... the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce." 40 C.F.R. § 122.2. The current degradation of the Ditch is in fact affecting interstate commerce under the facts alleged within the complaint, and if the arsenic levels continue to rise, the Ditch could affect interstate commerce within the Wildman Marsh. Alternatively the regulations include tributaries of any other "waters of the United States," so the Ditch as a tributary to the Reedy Creek, another CWA navigable water, would also be regulated under the EPA's regulations as a navigable water.

Under the most recent EPA guidance, Ditch C-1 is a non-permanent tributary and requires a significant nexus between that tributary and the traditional navigable water in order to support regulatory authority. The Reedy Creek is a traditional navigable water and the Ditch, under the alleged facts, bears a significant nexus with the Creek. Because the district court used the wrong legal standard in determining navigability under the CWA, this court should remand to the district court for a factual finding on the issue of whether Ditch C-1 bears a significant nexus with the Reedy Creek. *See Rapanos*, 547 U.S. at 784–85.

D. Point Sources Are Federally Regulated and Nonpoint Sources Are State Regulated Under the Clean Water Act.

The CWA prohibits "the discharge of any pollutant by any person" unless permitted under EPA's regulatory scheme. 33 U.S.C. § 1311 (2012). A discharge is defined as a pollutant's discharge into a navigable water from a point source. 33 U.S.C. § 1362(12) (2012). A point source is subsequently defined as "any discernible, confined and discrete conveyance, including

but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” *Id.*

Courts broadly interpret point sources to include everything from manure disbursement onto agricultural land and discharges into a city’s sewer system. *See Dague v. City of Burlington*, 935 F.2d 1343, 1354–55 (2nd Cir. 1991), *rev’d on other grounds*, 505 U.S. 557 (1992); *Concerned Area Residents for Env’t v. Southview Farm*, 34 F.3d 114, 118 (2nd Cir. 1994). However, courts will not interpret “discernible, confined, and discrete” so broadly as to effectively remove the requirement that the conveyance come from a specific point. *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 219 (2nd Cir. 2009). Congress laid out a lengthy definition for point source; it is a basic statutory interpretation precept that the legislature does not use words idly. *Id.* If Congress “intended to punish any human being who polluted navigational waters, it could readily have said: ‘any person who places pollutants in navigable waters without a permit is guilty of a crime.’” *Id.* (citing *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 646 (2nd Cir.1993)).

Under the EPA’s National Pollutant Discharge Elimination System Permit regulatory definition, a pollutant discharge expands on the CWA’s statutory language by including

surface runoff which is collected or channelled [sic] by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any “indirect discharger.”

40 C.F.R. § 122.2. Therefore, “surface water runoff which is neither collected nor channeled constitutes nonpoint source pollution and consequentially is not subject to [point source regulation].” *Cordiano*, 575 F.3d at 221.

The exclusion of a pollutant source from the point source category does not prohibit regulation of the source altogether; rather, this regulation is left to the states. *Id.* at 219–20. “Congress consciously distinguished between point source and nonpoint source discharges, giving EPA authority under the Act to regulate only the former.” *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir.1976). Congress specifically requires the states to create reports and management programs for regulating nonpoint sources. 33 U.S.C. § 1329 (2012).

E. Mining Waste Piles are Not Point Sources Under the Clean Water Act.

The CWA defines a point source as any “discernable, confined and discrete conveyance,” and this definition is broadly interpreted by the courts. Maleau’s arsenic contribution to Ditch C-1 originates from storm water runoff from the overburden and slag piles rather a conveyance system of any variety. Therefore, even under the CWA’s broad definition of point sources, Maleau’s piles do not fall within the federal regulatory scope but rather under the Progress’ nonpoint source management scheme.

Maleau’s piles do not constitute point sources because the property lacks a drainage system and storage ponds. Rainwater runoff is not collected or channeled by man in any way. Rainwater runoff percolates through the piles and then runs into Ditch-1 without any man made direction, making it a nonpoint source. EPA Guidance on nonpoint sources supports this point: “Nonpoint source pollution is caused by rain fall or snowmelt moving over and through the ground and carrying away natural and human-made pollutants into lakes, rivers, streams...” EPA, *Nonpoint Source Program and Grants Guidelines for States and Territories*, 68 Fed. Reg. 60653, 60655 (2003). In the absence of any man made confined and direct conveyance, simply storing mining slag on the site does not create a point source. The appropriate regulatory authority is Progress’ nonpoint source management scheme.

Therefore, we request that this court hold that Maleau's piles do not constitute a point source under the CWA. After holding this, the court should next look to the actual point source at issue: Bonhomme's culvert.

F. Bonhomme is Liable Under the Clean Water Act for the Unlawful Discharge of a Pollutant into a Navigable Water, From a Point Source.

The CWA does not consider causation when determining liability for the unlawful discharge of a pollutant into a navigable water. *See South Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004). In *South Florida*, the Supreme Court held that liability can apply "when pollutants originating elsewhere merely pass through the point source" in. *Id.* (internal citations omitted). The Court reasoned that

[a] point source is, by definition, a "discernible, confined, and discrete conveyance." That definition makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to "navigable waters," which are, in turn, defined as "the waters of the United States."

Id. (emphasis in original) (internal citation omitted).

Bonhomme tested the water in Reedy Creek upstream from the culvert and found no traces of arsenic; when he tested the water below the culvert he found significant concentrations of arsenic, indicating that the addition of arsenic to Reedy Creek was conveyed through Bonhomme's culvert. R. at 6. It is undisputed among the parties that arsenic qualifies as a pollutant and that the culvert on Bonhomme's property is where the pollutant flowed from Ditch C-1 into Reedy Creek. *Id.* Culverts are well established point sources. *Dague*, 935 F.2d at 1355. Bonhomme's own testing indicates that the culvert on his property conveyed pollutants into a navigable waterway without a NPDES permit and therefore he is liable under the CWA. Unlike Maleau's piles, the culvert is a "discernable, confined and discrete conveyance" created by man. *See South Florida*, 541 U.S. at 105. The arsenic's origin does not affect Bonhomme's liability

under the CWA. Bonhomme is liable for unlawfully adding arsenic through his culvert to Reedy Creek, a navigable water under the CWA.

This court should also remand to the district court for fact finding on Bonhomme's liability under the CWA consistent with this court's affirmation the Bonhomme's culvert not Maleau's piles are the point source under the CWA.

Additionally, if this court finds that Bonhomme may bring suit under the CWA, it should remand Bonhomme's case against Maleau to the district court for dismissal because Bonhomme not Maleau is the party responsible for violating the CWA.

CONCLUSION

Progress respectfully requests that this court affirm the district court's decision in part and remand in part. Progress asks this court to affirm that (1) Bonhomme is not a proper plaintiff to his action against Maleau because he is not a significant party in interest and a foreign national; (2) Reedy Creek is a navigable water subject to the CWA; (3) Maleau's mining waste piles are not point sources under the CWA; and (4) Bonhomme is liable under the CWA for a pollutant discharge into a navigable water without a NPDES permit. Progress asks this court to remand to the district court for a factual finding on the issue of whether Ditch C-1 bears a significant nexus with the navigable water, Reedy Creek, and is therefore also a navigable water under the CWA.